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In the Supreme Court of the United States

OCTOBER TERM, 1977

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

D. H. HOLMES COMPANY, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 556 F. 2d 787. The opinion of the district court (App. D, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1977 (App. B, *infra*). A timely petition

for rehearing and a suggestion for rehearing *en banc* was denied on December 5, 1977 (App. C, *infra*). On February 22, 1978, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including April 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure when it brings an enforcement action against private employers under Section 706 of the Civil Rights Act of 1964, 78 Stat. 259, as amended (42 U.S.C. (Supp. V) 2000e–5).

STATUTES INVOLVED

Section 706(f)(1) of the Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. (Supp. V) 2000e–5(f)(1), provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a

> respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commisson, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the

respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part:

CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are

questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the

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class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT

In late 1973, two female employees of the D. H. Holmes Company (Holmes), a Louisiana department store chain, reported to the company's upper management that they had been subjected to sexual harassment by their male supervisor. At the conclusion of an informal company investigation, Holmes found the charges groundless and fired the two women. They then filed complaints with the Equal Employment Opportunity Commission (EEOC) alleging that they had been discharged because of their sex (App. A, *infra*, pp. 5A–6A).[1]

Shortly thereafter, two more female employees filed charges with the EEOC alleging sex discrimination by

[1] One of the women also alleged that she had been denied a promotion as the result of sex discrimination.

Holmes. One claimed that she had been fired because of her sex, and the other alleged that she had been denied a promotion for that reason. A male security supervisor also filed a charge with the Commission alleging that he had been fired in retaliation for his supporting one of the initial complainants (*id.* at 6A–7A).

In September 1975, after an investigation and unsuccessful conciliation efforts, the EEOC filed a complaint against Holmes in the United States District Court for the Eastern District of Louisiana. The complaint charged Holmes with discriminating against female employees in promotions, discharges, and terms and conditions of employment, and with unlawful retaliation. The EEOC brought the action under Section 706 of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. V) 2000e–5, which authorizes the Commission to file civil actions against private parties when necessary to "prevent any person from engaging in any unlawful employment practices." 42 U.S.C. (Supp. V) 2000e–5(a). The Commission's complaint sought injunctive relief and backpay for all persons adversely affected by the company's allegedly discriminatory conduct.

In June 1976, Holmes moved to dismiss what it termed the "class action aspect" of the Commission's complaint. The district court denied the company's motion but ruled that the Commission would be required to comply with Rule 23 of the Federal Rules of Civil Procedure and the local district court rule governing class actions (App. D, *infra*). In a brief opinion, the district court stated that the EEOC apparently

"intended to bring this suit in the form of a class action" (App. D, *infra*, p. 26A). Although noting that Congress had not in any way suggested that Rule 23 should apply to Commission enforcement actions, the court concluded (App. D, *infra*, pp. 26A–27A) that this omission

> was not a conscious action or the result of incomplete draftsmanship, but results from the failure to perceive that the EEOC would attempt to file this type of proceedings without affording a defendant those safeguards of Rule 23 which would be available to it in a defense against all other plaintiffs.

The court certified its ruling for interlocutory appeal under 28 U.S.C. 1292(b), and an appeal was taken.

The court of appeals affirmed, agreeing with the district court that the EEOC intended to bring a class action and that it should therefore have to satisfy the requirements of Rule 23. The court observed that the EEOC had not limited the scope of the action to the five charging parties, either in its allegations of unlawful conduct or in its request for relief; instead, it had alleged that Holmes was engaged in sex discrimination in all of its stores and it had sought injunctive relief and backpay for "those persons adversely affected" by the company's discriminatory conduct. From the nature of the suit, the court concluded that "at this stage in the proceedings at least, it is a class action" (App. A, *infra*, pp. 12A–13A).

Although it recognized that the language and the legislative history of the Equal Employment Opportunity Act of 1972 are silent on the applicability of Rule 23 to EEOC suits brought under Section 706, the court construed this silence to mean that Congress did not intend to exempt EEOC suits from the requirements of Rule 23. The court noted that the 1972 Act had given the EEOC standing to sue on behalf of private individuals. Therefore, the court concluded, when the EEOC brings a suit under Section 706 for relief extending beyond the named complainants, "it does so subject to Rule 23 just as the private litigant in whose place it stands" (App. A, *infra* p. 15A). Accordingly, the court remanded the case for the district court to determine whether it should be certified as a class action or whether the EEOC should be restricted to seeking relief for the five charging parties.

REASONS FOR GRANTING THE WRIT

1. In 1972, Congress amended Section 706 of the Civil Rights Act of 1964 to enable the EEOC to bring suit in the district court against private employers alleged to have violated the Act (42 U.S.C. (Supp. V) 2000e–5(f)(1)). The Attorney General was given parallel authority to bring suit against state and local governments, governmental agencies, and political subdivisions. *Ibid.*

Actions brought by the EEOC or by the Attorney General under Section 706 are primarily intended to vindicate the public interest, not simply the private rights of complainants and similarly situated em-

ployees. See *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F. 2d 841, 846 (C.A. 8), certiorari denied, October 31, 1977, No. 77-146; *Equal Employment Opportunity Commission* v. *Occidental Life Insurance Co. of California*, 535 F. 2d 533, 537 (C.A. 9), affirmed, 432 U.S. 355; *Equal Employment Opportunity Commission* v. *General Electric Co.*, 532 F. 2d 359, 373 (C.A. 4); *Equal Employment Opportunity Commission* v. *E.I. duPont de Nemours and Co.*, 516 F. 2d 1297, 1299 (C.A. 3); *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352, 1359 (C.A. 6), certiorari denied, 423 U.S. 994.

When the EEOC brings an action under Section 706, it does not simply stand in the shoes of the complaining party, as the court of appeals assumed. Instead, the Commission's interests transcend those of the complainant and may differ in significant ways.[2] For example, a private party typically seeks an award of backpay for purposes of restitution; the EEOC, by contrast, may well seek backpay in a Section 706 proceeding principally to serve the public purpose of

[2] The difference in the interests of the EEOC and private employees is similar to the difference in the interests of the Department of Labor and union members in a suit brought under the Labor-Management Reporting and Disclosure Act, *Trbovich* v. *United Mine Workers of America*, 404 U.S. 528, 538–539, and the difference in the interests of private plaintiffs and the United States in an antitrust action, see *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688–690.

giving employers the "incentive to shun practices of dubious legality." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417–418; accord, *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (C.A. 8).

Similarly, EEOC investigations often disclose a variety of types of discriminatory conduct beyond the discrimination alleged in the charging party's complaint. Recognizing the different interests of the private complainant and the EEOC, the courts have held that the Commission is not limited, in a Section 706 suit, to the issues raised by the charging party, but may include all forms of discrimination discovered in its investigation of the charge and subjected to its conciliation efforts. *Johnson* v. *Nekoosa-Edwards Paper Co., supra*, 558 F. 2d at 846–847; *Equal Employment Opportunity Commission* v. *Hearst Corp., Seattle Post-Intelligencer*, 553 F.2d 579, 580 (C.A. 9); *Equal Employment Opportunity Commission* v. *General Electric Co., supra* 532 F. 2d at 366; *Equal Employment Opportunity Commission* v. *McLean Trucking Co.*, 525 F. 2d 1007, 1010 (C.A. 6). Indeed, the courts have held that the EEOC can bring a Section 706 suit if it finds reasonable cause to believe that the employer is engaged in unlawful employment practices even if it finds that the charging party is not entitled to relief. See, *e.g.*, *Equal Employment Opportunity Commission* v. *Huttig Sash & Door Co.*, 511 F. 2d 453 (C.A. 5); *Equal Employment Opportunity Commission* v. *Kimberly-*

Clark Corp., supra, 511 F. 2d at 1361; *Equal Employment Opportunity Commission* v. *Louisville & Nashville Railroad Co.,* 505 F. 2d 610, 617 (C.A. 5).

Because the Commission's suits are brought to vindicate public interests, they cannot fit within the framework of Rule 23, which was designed for the aggregation of private claims into one suit.[3] Recognizing this principle, a substantial majority of the courts that have considered the matter have concluded that the EEOC is not required to satisfy the provisions of Rule 23 when it brings suit under Section 706 seeking relief beyond the claims of the charging parties.[4] Be-

[3] The private nature of Rule 23 suits is illustrated by cases that have held that government entities seeking to bring antitrust actions must suffer an economic injury similar to that of the class they seek to represent. *People of State of Illinois ex rel. Bowman* v. *Home Federal Savings & Loan Association,* 521 F. 2d 704 (C.A. 7); *State of Illinois* v. *Bristol-Meyers Co.,* 470 F. 2d 1276, 1277 (C.A.D.C.).

[4] *Equal Employment Opportunity Commission* v. *Vinnell-Dravo-Lockheed-Mannix,* 417 F. Supp. 575 (E.D. Wash.); *Equal Employment Opportunity Commission* v. *Mobil Oil Corp.,* 6 FEP Cases 727 (W.D. Mo.); *Equal Employment Opportunity Commission* v. *Lutheran Hospital,* 10 FEP Cases 1177 (E.D. Mo.); *Equal Employment Opportunity Commission* v. *CTS of Asheville, Inc.,* 13 FEP Cases 852 (W.D.N.C.); *Equal Employment Opportunity Commission* v. *Pinkerton's, Inc.,* 14 FEP Cases 1431 (W.D. Pa.); *Equal Employment Opportunity Commission* v. *General Telephone Co. of Northwest,* 16 FEP Cases 476 (W.D. Wash.); *Equal Employment Opportunity Commission* v. *Whirlpool Corp.,* 16 FEP Cases 932 (N.D. Ind.); *Equal Employment Opportunity Commission* v. *International Telephone & Telegraph Co.,* D. N.J., No. 77–790 (March 16, 1978); cf. *Stuart* v. *Hewlett-Packard Co.,* 66 F.R.D. 73, 78 (E.D. Mich.).

The only court reaching the same result as the Fifth Circuit here is the District Court for the District of Colorado, in *Equal Employment Opportunity Commission* v. *Continental Oil Co.,* 13 FEP Cases 785 (D. Colo.), affirmed on other grounds, 549 F. 2d 884 (C.A. 10).

cause of the importance of the instant decision to the EEOC's enforcement actions and because of the existence of a substantial conflict among the district courts, we believe that the Court should review this case even though it is the first appellate decision to consider this question.[5]

2. Attempting to fit an EEOC enforcement suit into the mold of a private class action produces highly anomalous results. First, Rule 23 authorizes a class action to be brought only by "[o]ne or more members of a class," and this Court has emphasized the importance of assuring that the class representatives " 'possess the same interest and suffer the same injury' " as the class members. *East Texas Motor Freight System, Inc.,* v. *Rodriguez,* 431 U.S. 395, 403; *accord, Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 216; *O'Shea* v. *Littleton,* 414 U.S. 488, 491–495; *Bailey* v. *Patterson,* 369 U.S. 31, 32–33. However the class of injured persons may be defined, it is difficult to see how the EEOC can be characterized as a member of that class in order to satisfy the "membership" requirement of Rule 23.

The court of appeals sought to avoid this difficulty by finding that the EEOC could meet the "membership" requirement because Congress had given the

[5] The Court followed this course in *Curtis* v. *Loether,* 415 U.S. 189, 191 n. 2, in *Burns* v. *Alcala,* 420 U.S. 575, 577 and n. 2, and in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission,* No. 76–1383, decided January 23, 1978, although in the latter two instances a circuit conflict had developed by the time the cases were argued.

Commission standing to sue for complaining individuals. Whatever the merits of this interpretation of Rule 23, it again misconstrues the broader purposes of an EEOC action under Section 706. The EEOC does not merely "stand in the shoes of [complaining] individuals and represent them in a suit the individuals would otherwise be entitled to bring" (App. A, *infra*, p. 20A). It fosters broader and different purposes, and to that extent it may not be an appropriate representative for the individual interests of all the members of the "class" (see Fed. R. Civ P. 23(a)(4)).[6]

Second, even on the view that the EEOC stands in the shoes of the charging parties, the "typicality" requirement of Rule 23(a)(5) would arguably limit the EEOC to asserting claims similar to those of the charging parties in each case. Yet this restriction would be inconsistent with the line of cases cited above, which have recognized that the EEOC can seek relief, in a Section 706 action, for forms of discrimination broader than, or even different from, the discriminatory conduct alleged by the charging parties. In particular, the rule that the EEOC can bring a Section 706 action even when the charging party's complaint is not sustained envisions a procedure that is inconsistent with both the "typicality" and "membership" requirements of Rule 23.

[6] Congress recognized this disparity—and that the Commission does not act simply as a surrogate for charging parties—by providing, in Section 706(f)(1), that the Commission's assent to a conciliation agreement, absent express consent, cannot bind a charging party.

Third, the requirement of numerosity imposed by Fed. R. Civ P. 23(a)(1) could well impede the Commission's ability to enforce Title VII, particularly in cases involving small-scale employers. Under the ruling of the court of appeals, the EEOC would be prevented, in Section 706 suits, from seeking broad relief unless the charging parties could have brought their own class action. Therefore, unless the EEOC can show that it would have been impractical for the charging parties to join all the other potential plaintiffs individually, the EEOC would apparently be limited to seeking relief for the charging parties alone.

In light of the absence of any suggestion, either in the statute or the legislative history,[7] that Commission actions were intended to be treated as class ac-

[7] The court of appeals cited Senator Javits' remarks on the floor of the Senate as supporting its view that Congress intended the Commission's Section 706 suits to be governed by Rule 23 (App. A, *infra*, p. 16A n. 11). It is clear from the context of Senator Javits' remarks, however, that he was referring to Rule 23 class actions merely as an analogy to the Commission's Section 706 jurisdiction, not to suggest that the Commission would be bound by the restrictions of that rule. See *Equal Employment Opportunity Commission* v. *Whirlpool Corp.*, *supra*, 16 FEP Cases at 937–938; *Equal Employment Opportunity Commission* v. *General Telephone Co. of Northwest*, *supra*, 16 FEP Cases at 478.

The other item of legislative history cited by the court of appeals, a comment in the Section-by-Section analysis of the Act, supports the Commission's position, not the court's. That comment, 118 Cong. Rec. 7168, 7565 (1972), noted that the 1972 amendments were not intended to bar private parties from bringing class action lawsuits under Rule 23. The implication of the comment is that the Commission's suits were expected to be distinct from ordinary class action suits. Rule 23 was mentioned in connection with private class actions, not in connection with EEOC enforcement suits.

tions and governed by Rule 23, the court of appeals should not have imposed such a requirement, in derogation of the broad public purposes that Section 706 suits were intended to serve.

3. The decision of the court of appeals in this case, if permitted to stand, could have a substantial impact on other federal enforcement actions as well. For example, the Attorney General has enforcement authority under Section 706 with respect to suits against governmental entities; the decision of the court of appeals in this case would apparently require the Attorney General to procure certification under Rule 23 before seeking relief beyond the precise claims of named charging parties. This would impose a particularly serious impediment to enforcement actions against governmental entities, since some courts have held that the Attorney General can proceed only under Section 706 and does not have the option of bringing an action under Section 707 against an employer engaged in a "pattern or practice" of discrimination.[8] Accordingly, if the Attorney

[8] See *United States* v. *Fresno Unified School District*, 412 F. Supp. 392 (E.D. Cal.); *United States* v. *Pima County Community College District*, 409 F. Supp. 1061 (D. Ariz.); *United States* v. *Pompano Beach*, S.D. Fla., No. 76-6059 (July 18, 1976). Other courts have held that the Attorney General may initiate a Section 707 action either on his own, *United States* v. *City of Milwaukee*, 439 F. Supp. 264 (E.D. Wis.), or on referral from the EEOC, *United States* v. *State of South Carolina*, 15 FEP Cases 1196 (D. S.C.), affirmed memoranda, No. 77543 (January 16, 1978); *United States* v. *State of New York*, N.D.N.Y., No. 77-CV-343 (November 18, 1977); *United States* v. *Board of Education of Garfield Heights School District*, 435 F. Supp. 949 (N.D. Ohio); cf. *United States* v. *State of North Carolina*, 425 F. Supp. 789, 790 n. 2 (E.D. N.C.).

General could not satisfy the requirements of Rule 23 in a Section 706 proceeding, he would, under those holdings, have no means to challenge widespread discriminatory conduct by governmental entities.

In addition, the decision below may affect litigation under a variety of statutes other than Title VII, which authorize private actions and also provide for governmental suits that may benefit individuals. These statutes include the fair housing provisions of the Civil Rights Act of 1968, 82 Stat. 88, 42 U.S.C. 3613; the Equal Credit Opportunity Act Amendments of 1976, Pub. L. 94-239, 90 Stat. 251; Titles II, III, and IV of the Civil Rights Act of 1964, 78 Stat. 245, 246, 248, 42 U.S.C. 2000a-5, 2000b, and 2000c-6; the Employee Retirement Income Security Act of 1974, as added, 88 Stat. 891, 29 U.S.C. (Supp. V) 1132; the Equal Pay Act of 1963, 77 Stat. 56, as amended, 29 U.S.C. 206(d)(1); and the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. 621 *et seq.*[9]

4. Underlying the decision of the court of appeals in this case was an apparent concern that some restrictions should be imposed on Commission action so that an employer would "know against whom and upon what grounds * * * it must defend" (App. A, *infra*, p. 19A). While the interest in providing appropriate procedural protections for defendants is as legitimate in Title VII suits as in any other civil

[9] A district court in the Fifth Circuit has recently held that the Secretary of Labor is not restricted by the requirements of Rule 23 in an Equal Pay Act case, but, in light of the decision in the present case, the court has certified that questio nfor interlocutory appeal to the Fifth Circuit under 28 U.S.C. 1292(b). *Marshall* v. *University of Texas*, W.D. Tex., No. EP 75 CA 221 (February 6, 1978).

actions, the court selected a singularly inappropriate method for giving effect to that interest.

As this Court recognized in *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, 432 U.S. 355, 372–373, a defendant employer is notified of the scope of a Commission suit by the notice of the charge, the reasonable cause determination, and the conciliation proceedings, which must precede the filing of the action. Moreover, the court has ample authority, aside from Rule 23, to prevent abuse of discovery and to minimize the risk of unnecessary and duplicative litigation. The court can control the discovery process under Rule 26, and it can limit duplicative litigation by issuing an appropriate notice informing the charging party and other potentially aggrieved employees of the pendency of the Commission's action and their statutory right to intervene. If the other employees do not intervene, they will, in most circumstances, not be able to bring a separate action after the Commission's suit is concluded. See *McClain* v. *Wagner Electric Co.*, 550 F. 2d 1115, 1119 (C.A. 8).

Even if notice of a right to intervene is not issued, subsequent litigation is unlikely. If the Commission's suit is successful, a district court may include a provision in its decree conditioning the receipt of relief on the waiver of an individual's personal right of action. *United States* v. *Trucking Employers, Inc.*, 561 F. 2d 313, 318 (C.A. D.C.); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 853–862 (C.A. 5), certiorari denied, 425 U.S. 944. If the employer prevails, the decision will substantially deter private litigation. See *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 758–760 (C.A. 3) (*en banc*), certiorari denied, 419 U.S. 885; *Atlantis Development Corp.* v. *United States*, 379 F. 2d 818, 828 (C.A. 5).[10]

5. Finally, the decision of the court of appeals, if permitted to stand, will undesirably affect the allocation of enforcement responsibility between Section 706 and Section 707 of the Act, which provides for Commission suits against private employers engaged in a "pattern or practice" of discrimination.

The Commission has traditionally used Section 706 as the appropriate enforcement device in cases in which charging parties have filed complaints with the Commission. Section 707 is reserved for more serious cases involving systemic discrimination and initiated by a Commissioner's charge. See EEOC Guidelines, BNA Daily Labor Report, March 22, 1978, p. A–6. Yet the decision of the court of appeals would force the Commission to resort to Section 707 much more often, even in cases that the Commission considers more suitable for treatment under Section 706.

Even on the court of appeals' apparent assumption that Section 707 suits would not be subject to Rule 23 (App. A, *infra*, p. 11A, n. 8), the procedure envisioned by the court for handling cases such as this one would

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[10] To the extent, however, that the opinion below may reflect a view that a Commission suit on behalf of a group of employees should be binding on private parties, it is contrary to decisions such as *Williamson* v. *Bethlehem Steel Corp.*, 468 F. 2d 1201 (C.A. 2), certiorari denied, 411 U.S. 931; *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F. 2d at 845; and *United States* v. *Trucking Employers, Inc.*, *supra*, 561 F. 2d at 317.

be inordinately cumbersome. The court's proposed solution to the problem of the disparate private and public interests that the Commission seeks to enforce in Title VII actions is for the Commission to bring two suits simultaneously—one under Section 706, limited to the claims of the named complainants and another under Section 707, charging the employer with engaging in a pattern or practice of discriminatory conduct (see App. A, *infra*, p. 11A, n. 8). This would be unsatisfactory for several reasons. First, it would needlessly increase the number of lawsuits filed in such cases. Second, because private parties have no express right to intervene in Section 707 suits,[11] it could deny non-charging parties the right to participate in the action seeking class-wide relief. Third, even if the two actions were consolidated, or the 706 and 707 claims were brought as separate counts in the same action, it is difficult to see how the employer would be any better off, at least under the court of appeals' assumption view that Rule 23 would not be applicable to the "pattern or practice" portion of the consolidated action.

In sum, the court of appeals has selected a procedural device that would have disruptive effects on Title VII enforcement efforts by the EEOC and by the Attorney General, as well as a potentially substantial impact on other statutory enforcement schemes,

[11] See *United States* v. *Allegheny-Ludlum Industries, Inc.*, *supra*, 517 F. 2d at 844; *Equal Employment Opportunity Commission* v. *United Air Lines, Inc.*, 515 F. 2d 946 (C.A. 7). The right to intervene is expressly provided in Section 706 suits. 42 U.S.C. (Supp. V) 2000e-5(f)(1).

without appearing significantly to further the interests that the court sought to promote. Because of the uncertainty created by the decision of the court of appeals, the importance of the Fifth Circuit in enforcement of the Act, and the conflicting decisions among the federal courts, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1978.

258-562—78——4

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT

v.

D. H. HOLMES CO., LTD., DEFENDANT-APPELLEE

No. 76-4184

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

JULY 29, 1977

Appeal from the United States District Court for the Eastern District of Louisiana.

Before Coleman, Circuit Judge, Kunzig, Judge,* and Gee, Circuit Judge.

Kunzig, Judge:

This case of first impression (at the appellate level) comes to us on an interlocutory appeal from an order of the United States District Court for the Eastern District of Louisiana. The two questions presented on appeal are: Did the district court properly characterize this particular suit as a class action and, if so, did it correctly determine that the Equal Employment Opportunity Commission (EEOC) is gov-

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***Associate Judge, United States Court of Claims, sitting by designation.**

erned by Fed. R. Civ. P. 23[1] just as any normal plaintiff? We answer both questions in the affirmative and, therefore, uphold the order of the district court and remand the case for further proceedings.

The underlying dispute concerns instances of alleged sex discrimination in employment. The D. H. Holmes Company, Ltd. (Holmes, defendant-appellee), a Louisiana corporation which operates nine retail stores and employs approximately 3500 persons, is alleged to have violated certain provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. V 1975). The Equal Employment Opportunity Commission (EEOC, plaintiff-appellant) instituted suit under the authority of the Civil Rights Act, § 706(f)(1), 42 U.S.C.

[1] Fed.R.Civ.P. 23 provides in part:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

§ 2000e–5(f)(1) (Supp. V 1975)[2] and seeks an injunction prohibiting alleged sex discrimination, an order compelling affirmative action programs, and an award of back pay to "those persons adversely affected."

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of any action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subsidivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds

There has, of course, been no finding of facts by the court below and we make no intimation here concerning the truth of the matters asserted. But, drawing upon the already voluminous record made pursuant to pre-trial discovery, and, for the purposes of this appeal, construing those documents most favorably to the plaintiff (EEOC), the alleged facts may be stated as follows:

Holmes operates nine stores, is divided into 494 departments, and employs about 3500 workers. In October 1973, a series of incidents occurred which involved employees of the security department (store detectives) at the Lakeside store. Joseph Tardo,

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to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

[2] 42 U.S.C. § 2000e–5(f)(1) (Supp. V. 1975): (f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further

Lakeside store[3] security manager, was transferred to the Oakwood store and replaced at Lakeside by a new security supervisor. On October 15, 1973, his first duty day in his new position, the new Lakeside supervisor allegedly grabbed the arm of Maria Ma-

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action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

[3] The Lakeside store is located in Metairie, Louisiana.

rino, a store detective with some years experience and a subordinate of his. In a second incident, on October 16, 1973, the new supervisor allegedly rubbed his body against Mrs. Marino. Sharon Niedhardt, also a store detective at Lakeside, allegedly witnessed the October 16 incident and was herself a subject of alleged sexual advances by the same supervisor who was said to have drawn her attention to the zipper of his trousers on or about October 22. The two women brought these matters to the attention of upper management. Following an informal investigation, after which the charges were found to be groundless, the Holmes Company discharged the two women.

Mrs. Marino subsequently filed a complaint with the EEOC. She alleged first that the job of Lakeside store security manager should have gone to her on October 15, upon Mr. Tardo's departure, but that the position was denied her because of her sex. She further alleged that she was fired for having reported to upper management that the new security manager had made improper sexual advances to her.

Sharon Neidhardt also filed a complaint with the EEOC. She alleged that she was discharged for having reported that the new security manager had exposed himself to her. She requested and obtained a "right to sue"[4] letter from the EEOC, retained coun-

[4] "Right to sue letter" refers to the notification required by 42 U.S.C. § 2000e–5(f)(1) as a necessary condition for a private suit:

. . . If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

sel, and instituted suit against Holmes. *Niedhardt* v. *Holmes Co., Ltd.*, No. 72–2395 (E.D. La.) (subsequently consolidated with *EEOC* v. *Holmes* (Order of the court, dated Jan. 12, 1976), hereinafter referred to as *EEOC* v. *Holmes Co., Ltd.*)

Three other charges have been filed with EEOC. In November 1973, Pamela Clark, a display artist, filed a charge with EEOC that she had been fired because of her sex. In January 1974, Beverly Saxon, a security department employee at the Canal Street store filed a charge with EEOC alleging that she was being denied promotion because of her sex. Finally, in March 1974, Joseph Tardo, the former security department supervisor at Lakeside whose transfer in October 1973 set in motion the subsequent events of that month and who had just been discharged, filed a complaint with EEOC alleging that his discharge was a result of his having refused to cooperate with Holmes in its defense of Mrs. Marino's charges during the EEOC investigation.

In September 1975, EEOC itself instituted court action against Holmes. It filed an initial complaint against practices at the Lakeside store and later amended the complaint to include all the other stores. The amended complaint, filed in district court in March 1976, is drawn in general terms. It broadly alleges violations of §§ 703 and 704 of Title VII, 42

U.S.C. §§ 2000e-2 and 2000e-3 (1970 & Supp. V. 1975) commencing on July 2, 1965, and continuing thereafter. It seeks monetary and injunctive relief on behalf of "all those affected" but does not further identify this class in the complaint. In the course of discovery (which has been ongoing since October 1975), including depositions, interrogatories, and answers to interrogatories, it seems increasingly clear that EEOC is not limiting itself to securing relief only on behalf of the five parties (Marino, Niedhardt, Clark, Saxon and Tardo) who had filed complaints, but rather EEOC is seeking relief for a broad class of persons.

Though not styled as a class action, the complaint, together with the subsequent course of discovery, created apprehension on the part of defendant. Holmes was concerned that it was in fact about to become the defendant in a class action law suit without being afforded the procedural protections and judicial controls embodied in Fed. R. Civ. P. 23. On June 25, 1976, Holmes moved to dismiss the class action aspect of the complaint.

District Court Judge Charles Schwartz, Jr. held that EEOC had "intended to bring this suit in the form of a class action." The court below further held that EEOC must comply with Fed. R. Civ. P. 23 and local rule 2.12,[5] giving EEOC 90 days in which

[5] Local rule 2.12 provides in pertinent part that:

"c. Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F. R. Civ. P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appeared to be appropriate and necessary in the

to do so. The court stayed the proceedings until further order while denying Holmes' motion to dismiss the class action aspect at this stage. *EEOC v. Holmes Co., Ltd.*, 13 FEP Cases 449 (E.D. La. 1976). One requirement of Rule 23 is certification under 23(c); at the certification stage, EEOC must carry the burden of proof as to maintaining the class action aspect of this suit. 3B *Moore's Federal Practice* ¶ 23.02-2 n. 33 (2d ed. 1977). Of course, whether this suit will be certified as a class action remains to be seen.

Rather than comply with the lower court order, EEOC sought immediate interlocutory review here pursuant to 28 U.S.C. § 1292(b).[6] The trial judge certified a controlling and unsettled[7] question of law to us, and we granted leave to appeal.

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circumstances. Whenever possible, where it is held that the determination shall be postponed, a date will be fixed by the court for renewal of the motion."

[6] 28 U.S.C. § 1292(b) provides that:

Interlocutory decisions.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[7] In holding EEOC to the requirements of Rule 23, the trial court noted that "[a]lthough the 1972 amendments to Title VII of the Civil Rights Act of 1964 give the EEOC the right to sue in its own name, I do not believe there was an intention to relieve it of the obligations of the Federal Rules of Civil Procedure." The court went on to say that it was not Congress' purpose to grant

EEOC's position is that it need not follow Rule 23 and that, in any event, it cannot do so. EEOC contends that this cannot be a "Rule 23 class action" since it (EEOC) is not itself a member of the class. EEOC argues that Rule 23 on its face requires the party bringing a class action to be a member of the class which he purportedly represents. Further, EEOC argues, his cannot be a Rule 23 class action because the Commission seeks to vindicate a public as opposed to a private interest and so does not adequately represent the private members of the class as required by 23(a)(4). EEOC would still have this suit a class action, but it would be a statutory class action based on Title VII and not subject to Federal Rule 23.

Holmes, in opposition, asserts that this law suit, seeking broad injunctive and monetary relief on behalf of a class of persons, is a class action. That being so, Holmes urges that the chief issue is whether a class action filed by EEOC pursuant to § 706(f)(1) of Title VII of the Civil Rights Act of 1964 as amended is governed by Rule 23. Holmes maintains that there is no basis in law or reason to exempt EEOC from Federal Rule 23.

EEOC license to file "this type of [suit] without affording a defendant those safeguards of Rule 23 which would be available to it in a defense against all other plaintiffs." *EEOC* v. *Holmes Co. Ltd.*, 13 FEP Cases 449 (No. 75-2769, E.D.La.1976). For other cases which require EEOC to follow Rule 23, *see EEOC* v. *Continental Oil*, 13 FEP Cases 785 (D.C.Colo.1975) *aff'd on other grounds*, 548 F.2d 884 (1977); *EEOC* v. *Data Point Corp.*, 12 FEP Cases 1133 (W.D.Tex.1975) appeal docketed (5th Cir. No. 76-2862).

At least five district courts have, in brief opinions, taken a contrary position. In the peculiar context of the case before it, one court dismissed defendant's concerns that EEOC follow Rule 23 as "strained," "unrealistic" and smacking of "corporate paranoia," after having concluded that EEOC had not filed a class

We agree with Holmes and with the court below. EEOC intended to bring this suit in the form of a class action and, at this stage of the proceedings, it is a class action. When EEOC brings a class suit under § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) it too must abide by appropriate Federal Rules of Civil Procedure, including Rule 23. We note at the outset that we are not here concerned with the merits of the case. Five parties have made charges against the Holmes Company that may merit relief; we are confident that the trial court will afford them a full and fair trial on those issues. The questions here before us on this interlocutory appeal are, therefore, very narrow ones which concern merely the procedural side of this case.[8]

The initial issue is whether this is a class action. We conclude that it is.

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action. Other cases generally held that EEOC should be treated with special deference because EEOC suits under Title VII serve to vindicate important public interests. *See EEOC* v. *Vinnel-Dravo-Lockheed-Mannix*, 417 F. Supp. 575, 12 FEP Cases 1815 (E.D.Wash.1976); *EEOC* v. *CTS of Asheville, Inc.*, 13 FEP Cases 852 (W.D.N.C.1976); *EEOC* v. *Rexene Polymers Co.*, 10 FEP Cases 61 (W.D.Tex.1975); *EEOC* v. *Lutheran Hosp.*, 10 FEP Cases 1177 (E.D.Mo.1974). This "EEOC-is-different" argument alone is not enough to free EEOC from Rule 23. It misses the point; presumably the Government vindicates some congressional policy whenever it sues.

[8] Furthermore, we note emphatically that this is *not* a situation in which application of procedural rules will thwart any substantive right whatsoever.

If, for any reason, EEOC is not certified below but still believes a pattern or practice of discrimination exists in the Holmes Company, its recourse is to file a suit under §.707 of the Civil Rights Act, 42 U.S.C. § 2000e-6. At the same time, EEOC might continue to seek relief for the five named individuals in the instant case under § 706, 42 U.S.C. § 2000e-5 upon dropping the class aspects of this suit.

The trial court, in ruling that EEOC intended to bring a class action, found the law suit to be a class action (at least at this stage). Our review supports the district court's finding in this regard. EEOC has repeatedly asserted that broad, class relief is precisely what it seeks. Its intent is evidenced not only by a fair construction of the complaint, but by other conduct as well.

First, there are the pleadings themselves. The complaint is very broadly and vaguely drawn. It names no employee adversely affected by unlawful discharge, promotion, or other employment policy. Nor does it name any employee opposing such alleged practices who has been harassed as a result. It does not specify at which of the nine stores or in which of the 494 departments alleged violations of the Civil Rights Act took place. It does not name particular dates on which these alleged violations occurred. Instead, the complaint is drawn in the broadest terms so as to include all female employees, all nine stores, all 494 departments, and every day from July 2, 1965 (the effective date of the Civil Rights Act) to the present.

Furthermore, the request for relief is likewise drawn with great generality. We pass over the prayer for injunctive relief as, class action or not, the practical effect of an injunction is likely to be the same. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 261–62, 92 S.Ct. 885, 31 L. Ed. 2d 184 (1972); *Bailey* v. *Patterson*, 323 F. 2d 201, 206 (5th Cir.), *cert. denied*, 376 U.S. 910, 84 S. Ct. 666, 11 L. Ed. 2d 609 (1963). But we do pause at the prayer for backpay. Such relief is sought on behalf of all "those persons adversely affected." We can only assume this to mean that relief, if granted, is to run in favor of a class of beneficiaries defined somehow by their relationship to the wrongs alleged.

If this complaint and prayer do not amount to a "class action," we are at a loss to know what does.

Second, there is the course of discovery so far. On more than one occasion, EEOC has demonstrated its belief that it had filed a class action complaint. In response to defendant's interrogatories, EEOC answered that it had not yet determined the "number and size" of the "classes" for which it seeks back pay. Record, Vol. I at 36 (plaintiff's answers to defendant's first interrogatories). In the course of taking depositions, counsel for EEOC even sought to widen the scope of discovery by stating that an additional employee of Holmes would "fit into the class of females, the class aspect of this suit." Deposition of William D. Serex, March 5, 1976 at 15.

Third, there is the fact that EEOC resisted Holmes' motion to dismiss the class action aspect of this suit. It was EEOC's very success in this regard that brings this interlocutory appeal before us now.

Lastly, on appeal, EEOC has accepted the fact that this is a class action. Both in its brief and at oral argument, EEOC conceded that this is a suit "which seek[s] *broad relief for a class of persons*. . . ." Brief of EEOC at 4.

We hold, therefore, that the district court is correct. The EEOC did intend to bring a class action, hence, at this stage in the proceedings at least, it is a class action. *Kahan* v. *Rosenstiel*, 424 F. 2d 161, 169, (3d Cir.) *cert. denied* 398 U.S. 950, 90 S. Ct. 1870, 26 L. Ed. 2d 290 (1970); *Torres* v. *Dept. of Labor*, 318 F. Supp. 1313, 1317 (S.D.N.Y. 1970).[a]

[a] "Until the court has ruled that an action cannot continue as a class action, it must be regarded as a class action if the pleadings so provide. . . ." *Wright on Federal Courts* § 72 at 314 (2nd ed. 1970). 3B *Moore's Federal Practice* ¶ 23.50 at 23–1103 (2d ed.

The second issue is whether the EEOC, when it brings a class action pursuant to §706(f)(1), 42 U.S.C. §2000e–5(f)(1)(Supp. V 1975), must follow Rule 23. We conclude that it must.

The trial court ordered EEOC to comply with Fed. R.Civ.P. 23 and local rule 2.12. The EEOC asserts that it need not comply and that Title VII, §706(f)(1), creates a statutory class action outside Rule 23. EEOC argues further that, in any event, it cannot comply with Rule 23. We disagree with EEOC on each point.

Nothing in the statutory language or legislative history of Title VII, §706(f)(1) as amended, 42 U.S.C. §2000e–5(f)(1)(Supp. V 1975) supports the position EEOC advances regarding an action *outside* Rule 23.

The original Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (1970) created a private cause of action under §706 which has been construed to give rise to class action law suits under Rule 23. *See, e.g., Oatis* v. *Crown Zellerbach Co.,* 398 F. 2d 496, 499 (5th Cir. 1968); Comment, *The Class Action and Title VII-An Overview,* 10 U. Rich. L. R. 325, 326 & n. 10 (1976).

The Act was amended in 1972 for the purpose of bolstering EEOC's enforcement ability. As the House Education and Labor Committee reported:

> Despite the progress which has been made since passage of the Civil Rights Act of 1964, discrimination against minorities and women continues. The persistence of discrimination, and its detrimental effects requires a reaffirmation of our national policy of equal opportunity in employment.

1977). We have found the trial court to have properly so construed the pleadings. *See Woods* v. *Wright*, 334 F. 2d 369, 374 (5th Cir. 1964).

> It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided to the Equal Opportunity Commission to strengthen its efforts to reduce discrimination in employment. H. R. Rep. No. 92–238, 92d Cong., 2d Sess. 1972, reprinted in [1972] U.S. Code Cong. & Ad. News, pp. 2137, 2139.

Section 706, 42 U.S.C. §2000e–5(f)(1) was accordingly widened to permit EEOC to sue in its own name for the redress of individual injury. However, the 1972 amendments to §706 in no way altered any class action procedures nor the post-1964 case law which generally held private suits under §706(f)(1), 42 U.S.C. 2000e–5(f)(1), to be appropriate for class action litigation governed by Rule 23. *E.g., Oatis* v. *Crown Zellerbach Co., supra.*

The express statutory language certainly does not exempt EEOC from Rule 23, it merely authorizes EEOC to bring civil suits under §706. It gives EEOC standing to sue under Title VII to the same extent as individuals aggrieved by discrimination in employment. Logically it follows, then, that when EEOC brings a class action suit under §706, 42 U.S.C. 2000e–5(f)(1) (as an individual aggrieved may do), it does so subject to Rule 23 just as the private litigant in whose place it stands.

Nor did Congress, seeking to increase the enforcement power of EEOC,[10] and with the class action issue

[10] The authority granted in the 1972 amendments has enabled EEOC to increase its conciliation success rate to almost 50 percent. Address by then EEOC Chairman Powell, ABA Section on Labor Relations Law, National Institute, Washington, D.C., May 8, 1974 (unpublished). Cited in Isaacson & Zifchak, *Fair Employment Forums After Alexander* v. *Gardner-Denver Co.: Separate and Unequal*, 16 Wm. & M. L. Rev. 439 (1975).

generally before it, intend to exempt EEOC from Rule 23 either expressly or impliedly. Indeed, all signs gleaned from the legislative history go the other way.[11] Certainly, the ability to sue for class relief outside of Rule 23 might well add a powerful tool to EEOC's enforcement arsenal. Just as certainly

[11] During Senate debate on the 1972 amendments, Senator Javits, one of the floor managers of the bill and the ranking member of the Committee which reported it, explained:

> These are essentially class actions and if [EEOC] can sue for an individual claimant, then they can sue for a group of claimants. It seems to me that this is provided for by the rules of civil procedures in the Federal courts. . . .
>
> I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party. 118 *Cong. Rec.* 4081–82 (1972), reprinted in Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 1589–90 (1972). (Hereinafter "Legislative History").

Senator Javits' comments were made in debate concerning amended § 707 pattern and practice suits. Though § 707 is not at issue now, clearly his remarks apply with equal force to § 706 suits.

Further, the managers of the bill were aware that Title VII litigation under § 706 frequently takes the form of class actions and sought to make certain that the procedural rules governing them would not be disturbed by extending authority to bring such actions to the EEOC. Senator Williams, Committee Chairman and floor manager of the bill, stated in a section-by-section analysis:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. . . . [T]he leading cases in this area to date have

though, it is for the Congress and not for us to grant EEOC this power.

In any event, Congress knows how to set up federal actions governed by systems of procedure other than the Federal Rules of Civil Procedure.[12] It has not done so here.

Since we cannot find independent statutory authority for EEOC's contention that it is exempt from Rule 23, we now turn to the Federal Rules to see if there is any special exemption granted therein. Fed. R.Civ.P. 1 states that "These rules govern . . . all suits of a civil nature . . . at law or in equity. . . ." The only exceptions stated in the Rules are those found in Fed.R.Civ.P. 81. The National Labor Relations Board is one such exception; EEOC is not. If the Supreme Court or Congress had wanted to include EEOC among the exceptions, they clearly had the power to do so. 28 U.S.C. § 2072 (1970 & Supp. V 1975). They did not do so here.

A reading of Rule 23 in light of its history and the ends it serves further illustrates the inappropriateness of granting exceptions at random. The Rule as originally adopted in 1938 was an attempt to encourage use of the class action device which, em-

> recognized that Title VII claims are necessarily class action complaints. . . . Legislative History, 1773. *See also Id.* at 1847.

In addition, EEOC conceded at oral argument that there is no indication that anyone from the EEOC (or elsewhere) ever approached the Congress to request the special treatment now contended for.

[12] Proceedings under the Bankruptcy Act, for example, are, since 1973, had under special rules of procedure promulgated by authority of 28 U.S.C. § 2075 (1970). Prior to 1973, proceedings in bankruptcy were to follow the Federal Rules of Civil Procedure to the extent "as they are not inconsistent with this act." 11 U.S.C. Appendix, Order 37 (1970).

ployed effectively, would further the interests both of judicial administration and justice. The Rule was extensively amended in 1966. One important change was to eliminate the so-called "spurious" class action; henceforth all class actions will have a binding effect on the members of the class (excepting those who opt out of a 23(b)(3) class). See Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 Antitrust L.J. 295, 297. Because of the res judicata effect of a class action judgment on absent members of the class and the concomitant protection afforded a defendant, the necessity for closer judicial control was apparent and better guidance was provided:

> The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgements including those whom the court finds to be members of the class, whether or not the judgement is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions. Advisory Committee's Notes, 39 F.R.D. 69, 99 (1966).

It scarcely needs to be added that Fed. R. Civ. P. 23 also furthers several other important interests. It helps prevent piecemeal suits, saving time and expense. It permits widescale relief, often encouraging people with small claims to come forward.[13] At the same time, it affords the defendant a measure of pro-

[13] This factor may not weigh so heavily in the context of a Title VII suit. The award of attorney's fees to the prevailing party is permissible. 42 U.S.C. § 2000e-5(k) (1970). The statutory grant of jurisdiction for Title VII actions does not impose an amount-in-controversy requirement. 42 U.S.C. § 2000e-5(f)(3) (1970 & Supp. V 1975).

tection against inconsistent adjudications and it establishes a degree of judicial control to check possible abuse of the class device. All of these interests remain compelling regardless of the identity of the plaintiff. We certainly do not see why EEOC, in particular, presents a special case. If EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question. *See generally*, Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment.* 52 Minn. L. Rev. 509 (1967-68).

Only through properly functioning judicial procedures will the interests of either party be protected in the long run. Absent a Congressionally developed alternative, there can be no good accomplished by an abandonment of Rule 23 in this case. In no way will the national goal of gaining equal employment opportunity be advanced by precipitously discarding our established rules of procedure.

We note that the protection afforded a defendant by Rule 23 is particularly apposite on the record before us. Here is a situation where five employees have filed charges against Holmes with the EEOC. These individual complaints will be fairly and fully adjudicated below. But now we have a proceeding where EEOC has alleged a broad range of wrong-doing[14] and is using the equally broad federal discovery devices to expand its case, pushing for class action discovery

[14] It was suggested at oral argument that this complaint was not unlike a shotgun blast fired while leaning out a window. This court has, as a general rule, insisted that such actions on behalf of unnamed persons must be brought in conformity with Rule 23. *Danner* v. *Phillips Petroleum Co.*, 447 F.2d 159, 164 (5th Cir. 1971).

privileges without submitting to class action controls (and, in fact, resisting them).

Holmes, for its part, does not know against whom and upon what grounds precisely it must defend; and this a year and a half after EEOC filed its initial complaint. Neither Holmes nor anyone else can predict the res judicata effect of a decision on the merits. If EEOC is permitted to proceed outside Rule 23, and if it should obtain money damages for back pay which it seeks on behalf of a class, in whose favor, specifically, does that money judgment run? Likewise, should Holmes prevail on the merits, what would be the finality of judgment as against individuals arguably within the class? Holmes could well find itself relitigating this case for the rest of its days.

In short, if this is not precisely the situation which Rule 23 was intended to govern, we are not likely to see another. All parties potentially involved in Title VII litigation need to know the rules for conducting the litigation and the scope and effect of a judgment (or settlement). Fed. R. Civ. P. 23 seeks to do just that.

Finally, EEOC argues, as a matter of law, it can never satisfy the requirements of Rule 23 because it is not itself a member of the class and because it cannot adequately protect the interests of the other (private) class members.

We address first EEOC's contention that it cannot meet the membership criterion of the initial phrase of Rule 23(a). We disagree.

Here EEOC has been given explicit statutory standing to sue. To hold that EEOC is not a "member of the class" as that term is used in Rule 23 would be contrary to Congress' purpose. Especially when EEOC seeks to recover back pay for individuals, it would seem to be Congress' clear intent that EEOC stand

in the shoes of those individuals and represent them in a suit the individuals would otherwise be entitled to bring. Where individuals can institute Title VII suits under Rule 23,[15] it would be anomalous in the extreme to hold that EEOC, an enforcement agency expressly authorized by Congress to sue, may never do so under Rule 23 solely because it runs afoul of the membership requirement.[16]

The crux of the matter is this: Having been set up by law to bring civil actions on behalf of persons allegedly discriminated against, EEOC has standing to sue, is a real party in interest, and, we hold, for purposes of Rule 23, is a member of the class.

We now turn to EEOC's contention that, as a matter of law, it can never be an adequate representa-

---

[15] The membership language of Rule 23 seems directed at individuals. It has, however, been applied to organizations and certain organizations have been permitted to bring class actions even though not themselves members of a class. *Smith* v. *Board of Education*, 365 F. 2d 770, 777 (8th Cir. 1966) (per Blackmun, J.); *See Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 937 (2nd Cir. 1968); 7 Wright & Miller, *Federal Practice and Procedure: Civil* § 1761 at 591; *Cf. Civil Service Comm'n* v. *Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 551 n. 2, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973).

Where organizations, formed by their membership for purposes of mutual benefit, yet not themselves members of a class, have sued under Rule 23, it would be incongruous to hold that EEOC cannot.

[16] We emphasize that it is Congress which has conferred standing on EEOC. Congress has thus determined that EEOC does sufficiently "possess the same interest and suffer the same injury" as the class members for whom it would sue. *East Texas Motor Freight* v. *Rodriguez*, —— U.S. ——, ——, 97 S. Ct. 1891, 1896, 52 L. Ed. 2d 453 (1977); *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. 208, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974). Congress, then, has concluded our inquiry and has made EEOC a member of the class of discriminatees that EEOC statutorily represents.

tive of the class as required by Rule 23(a)(4)." We again disagree. In the normal situation, we might expect EEOC to be a representative *par excellence*. Having as it does the resources, experience and tenacity adequately to serve the interests of the class it purports to represent, we would think of it as certainly as likely a candidate as any to satisfy 23(a)(4). We note that EEOC voices concern over its public purpose as opposed to the private interests in this case. *But see Hunt* v. *Wash. State Apple Adver. Comm.*, —— U.S. ——, ——, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *Occidental Life Ins. Co.* v. *EEOC*, —— U.S. ——, ——, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977). Such concerns pose a question of fact to be "raised and resolved in the trial court in the usual manner" and which is not properly before us at this stage. *Johnson* v. *Georgia Highway Exp., Inc.*, 417 F. 2d 1122, 1124 (5th Cir. 1969).

EEOC, if it would be an exception to Rule 23, has the burden of pointing out why it should be accorded special treatment. This it has not done. In light of our holding that EEOC can satisfy Rule 23, we are aware of no untoward burden that Rule 23 will impose on EEOC suits under 42 U.S.C. § 2000e–5(f)(1) (Supp. V 1975). EEOC has not persuaded us that it is excepted from Fed. R. Civ. P. 23. Here EEOC is using the federal rules to conduct what may turn out to be a wide-ranging investigation into Holmes' affairs. But, to the extent that it goes beyond the five identified complainants (and nobody seems to know just how far it does go), it looks like an investigation in search

[17] The other three requirements of Rule 23(a) are not at issue on this appeal. For a discussion of the requirements a Title VII class action plaintiff must meet under Rule 23, see Smalls, *Class Action Under Title VII: Some Current Procedural Problems*, 25 Am. U.L. Rev. 821, 834–51 (1976).

of a plaintiff. Certainly there is a right to investigate and a right to institute court action, but always under appropriate rules which must protect all parties.

In summary, we hold that this is a class action, and the EEOC *must* comply with Rule 23. We hold that EEOC has standing to sue and is a "member of the class" for purposes of Rule 23. We further hold that, as a matter of law, EEOC can be an "adequate representative." We again emphasize the procedural posture of this case. The certification ruling has yet to take place and will present factual questions as to which we express no view. *See East Texas Motor Freight* v. *Rodriquez*, —— U.S. ——, ——, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977).

Accordingly, we affirm the order of the court below and remand for further proceedings not inconsistent with this opinion.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-4184

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT

v.

D. H. HOLMES COMPANY, LTD., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of Louisiana

Before Coleman and Gee, *Circuit Judges*, and Kunzig, Judge*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby, affirmed and that this case be and is hereby remanded to the said district court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

JULY 29, 1977.

* Associate Judge, U.S. Court of Claims, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

DECEMBER 5, 1977

No. 76-4184—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* D. H. HOLMES CO. LTD.; SHARON NIEDHARDT v. D. H. HOLMES CO., LTD.

DEAR COUNSEL: This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

By BRENDA M. HAUCK,
Deputy Clerk.

**On behalf of appellant, EEOC.

APPENDIX D

NIEDHARDT v. D. H. HOLMES CO.

U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

Charles W. Schwartz, District Judge:—This matter came on for hearing on August 25, 1976, on motion of Defendant D. H. Holmes Co. Ltd. to dismiss the class action aspect of the complaint in C.A. 75–2769 and to dismiss all allegations of the complaint outside of the scope of the issues raised during the pendency of the charges before the Equal Employment Opportunity Commission.

The Court, after considering the record in this matter, as well as the memoranda and oral argument of counsel, is of the opinion that plaintiff in C.A. 75–2769, Equal Employment Opportunity Commission, intended to bring this suit in the form of a class action and in particular notes its answer to Interrogatory No. 1(d). Although the 1972 amendments to Title VII of the Civil Rights Act of 1964 give the EEOC the right to sue in its own name, I do not believe there was an intention to relieve it of the obligations of the Federal Rules of Civil Procedure.

This Court concludes that the failure of Congress to make specific provisions of this type of case was not a conscious action or the result of incomplete draftsmanship, but results from the failure to perceive that the EEOC would attempt to file this type of proceedings without affording a defendant those

safeguards of Rule 23 which would be available to it in a defense against all other plaintiffs.

We agree with the defendant that the requirements of due process, judicial economy, manageability and fair play in situations such as this require that the safeguards of Rule 23 be utilized.

It has been held that broad-based EEOC actions brought under § 706 are Rule 23 class actions. EEOC v. Continental Oil Co., 393 F. Supp. 167, 10 FEP Cases 952 (D.C. Col. 1975), particularly that court's unpublished order to that effect.

In other cases the courts have applied Rule 23 and have proceeded as if the matter was a class action without denominating it as such, which is a further indication that courts recognize that defendants in such cases should be afforded the protection of Rule 23. EEOC v. Datapoint Corp., 12 FEP Cases 1133 (W.D. Tex. 1975). See U.S. v. Allegheny-Ludlum Industries, 11 FEP cases 167 (5th Cir. 1975). In this case the Fifth Circuit cites with approval the action of the lower court which had defined classes pursuant to Rule 23 and thus by implication appears to approve such a procedure. Furthermore, Section 706 suits have been held to be class actions. Taylor v. Safeway Stores, Inc., 11 FEP Cases 449 (10th Cir. 1975); Waters v. Heublein, Inc., 12 FEP Cases 617 (N.D. Ca. 1975). Accordingly,

IT IS ORDERED, that the motion of the defendant D. H. Holmes Co., Ltd. to dismiss the class action aspect of the complaint in No. 75–2769 be and the same is hereby DENIED.

IT IS FURTHER ORDERED that the EEOC must comply with Rule 23 of the Federal Rules of Civil Procedure and Rule 2.12 of the General Rules of the United States District Court for the Eastern

District of Louisiana. The EEOC shall have 90 days from this date within which to comply with the requirements of Rule 2.12. The Court's decision on the defendant's motion to dismiss all allegations of the complaint outside the scope of issues raised during the pendency of charges before the EEOC is hereby deferred until after such time as plaintiff Equal Employment Opportunity Commission complies with this Order and defendant reurges same.

In that this Court is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation,

IT IS FURTHER ORDERED that the plaintiff, EEOC, be permitted to take an Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b). Application for an appeal hereunder shall stay proceedings in the District Court.

In accordance with the stipulation and agreement of counsel,

IT IS FURTHER ORDERED that proceedings in these consolidated matters, Civil Actions Nos. 75-2395 and 75-2760 be and they are hereby STAYED pending further orders of this Court.

U.S. GOVERNMENT PRINTING OFFICE: 1978

Supreme Court, U.S.
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MAY 6 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1415

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner

VERSUS

D. H. HOLMES COMPANY, LTD.,

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1415

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

versus

D. H. HOLMES COMPANY, LTD.,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent D. H. Holmes Company, Ltd. opposes the petition of the Equal Employment Opportunity Commission for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case and respectfully urges the Court to deny the writ.

OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 787, and is reproduced at Appendix A of the Solicitor General's petition. The opinion of the district court is not officially reported, but is unofficially reported at 13 FEP Cases 449, and is reproduced at Appendix D of the Petition.

JURISDICTION

The judgment of the court of appeals was entered July 29, 1977 (Petition App. B). A timely petition for rehearing and a suggestion for rehearing *en banc* was denied on December 5, 1977 (Petition App. C) after a majority of Circuit Judges in regular active service did not vote in favor of it. On February 22, 1978, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including April 4, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a class action filed by the Equal Employment Opportunity Commission pursuant to §706(f) (1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f) (1) (Supp. V 1975) is to be governed by and subject to the provisions of Rule 23 F.R.Civ.P.[1]

STATUTES INVOLVED

Section 706(f) (1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f) (1) (Supp. V 1975), provides:

1. Implicit in this question is the proposition that this *is* a class action. In the trial court and court of appeals petitioner took the position that this was not a class action, but rather an action seeking "broad injunctive and monetary relief for a class of persons." Petitioner's arguments have been refined somewhat since then and, from a fair reading of the instant petition, it now appears that petitioner concedes this is indeed a class action, albeit one not governed by Rule 23.

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, which ever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or agianst individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT

The underlying dispute here concerns alleged instances of sex discrimination in employment. Respondent D. H. Holmes Company, Ltd. (Holmes), a Louisiana corporation which operates nine retail department stores in three states with approximately 3,500 employees in 494 departments, is alleged to have violated certain provisions of Title VII of the Civil Rights Act of 1964, as amended, 49 U.S.C. §2000e *et seq.*

In early October 1973, Joseph Tardo, security supervisor at respondent's suburban New Orleans Lakeside store, was transferred to another suburban store and replaced at Lakeside by a new (male) security supervisor. On October 15, 1973, his first day in his new job, the new Lakeside security supervisor allegedly grabbed the arm of Maria Marino, a store

detective with some years experience and a subordinate of his. The next day the new supervisor allegedly rubbed against Mrs. Marino. Sharon Neidhardt, another store detective at Lakeside, alleged that she too was the object of "sexual advances" by the new supervisor on October 22. The two women reported these alleged incidents to upper management. After an investigation by management, the allegations were found to be completely groundless and the two women were discharged for having falsely accused the supervisor.[2]

Mrs. Marino filed a charge with the EEOC alleging that when Mr. Tardo left she should have been promoted into his place as new security supervisor instead of the male, and that her sex was the reason she did not get the promotion. She also alleged that she was discharged because she reported the alleged "sexual advances" to upper management. Sharon Neidhardt also filed a charge with the EEOC alleging that she had been discharged because she reported to upper management the alleged "sexual advance" made to her by the same supervisor.

Three other charges were filed with the EEOC. In November 1973, Pamela Clark, a display artist, filed a charge with the EEOC alleging that she had been discharged because of her sex. In January 1974, Beverly Saxon, a security department employee as were Mesdames Marino and Neidhardt, filed a charge with the EEOC alleging that she had been denied a promotion because of her sex. In March 1974, another security department employee, Joseph Tardo, Mrs.

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2. As noted by the circuit court, there has been no finding of facts by the trial court. This fact recitation is taken from the circuit court opinion where, for purposes of the appeal, the record made pursuant to discovery was construed most favorably to petitioner. (Petitioner's App. A, pp. 2A-7A.)

Marino's former supervisor at the Lakeside store whose transfer in October 1973 set in motion the subsequent events of that month, filed a charge with the EEOC alleging that he had been discharged for failing to cooperate with respondent in its defense of Mrs. Marino's charge during the EEOC investigation.

In September 1975, the EEOC filed suit against Holmes in the Eastern District of Louisiana. It filed an initial complaint against alleged practices at the Lakeside store and later amended the complaint to include all the other stores. The amended complaint, filed in March 1976, is drawn in the most general terms. It broadly alleges violations of §703 and §704 of Title VII, 42 U.S.C. § §2000e-2 and 2000e-3, commencing on July 2, 1965 (the effective date of Title VII) and continuing thereafter. It seeks monetary and injunctive relief on behalf of "all those affected" but does not further identify this class in the complaint (Petit. App. pp. 7A, 8A).

As a result of the amended complaint, it became clear to Holmes that now, the EEOC was not suing on behalf of the five charging parties only, but rather on behalf of a broad class of persons. Holmes realized that although the complaint was not styled as a class action, it was in fact now the defendant in a sprawling class action lawsuit without being afforded any of the protections and judicial controls of Rule 23 F.R.Civ.P. Holmes therefore moved, in June 1976, to dismiss the class action aspect of the complaint.

The district court held that although the complaint was not denominated a class action, it was a *de facto* class action and that, therefore, the appropriate rules governing class actions must come into play. Accordingly, the district court

gave EEOC ninety days within which to comply with Rule 23 F.R.Civ.P. and with local rule 2.12.[3] Rather than comply with the district court order, the EEOC sought and obtained interlocutory review pursuant to 28 U.S.C. § 1292(b).

The court of appeals, agreeing with Holmes and the district court, affirmed, holding that this action is a class action and that the EEOC must comply with Rule 23 (Petit. App. p. 23A).

REASONS FOR DENYING THE WRIT

1. The decision of the court of appeals is not in conflict with any other appellate court decision nor is it in conflict with any decision of this Court.

The petition points out that there is a division of opinion on the question presented here at the district court level (Petit. App. p. 12). However, as the Petitioner also points out, there are no other circuits which have decided the question, and therefore no conflicting decisions from other circuits. There is now, however, another Fifth Circuit decision on point, *viz., Equal Employment Opportunity Commission v. Datapoint Corp.*, (5 Cir. April 7, 1978) No. 76-2862,__ F.

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3. Local rule 2.12 provides in pertinent part that:

c. Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c) (1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination shall be postponed, a date will be fixed by the court for renewal of the motion.

2d ___. This decision reaffirms the view of the Fifth Circuit that class actions brought by the EEOC under § 706(f) (1) of Title VII are subject to Rule 23 treatment.

Thus there are now two Fifth Circuit decisions, consistent with each other, affirming that Rule 23 applies to class actions brought by the EEOC and no conflicting decisions of any other appellate courts or of this Court.[4] Thus there is clearly no necessity or need for review by this Court.

The essence of Petitioner's petition is simply that the circuit court was wrong. While we do not agree, we respectfully point out that it has historically not been the function of this Court to simply correct errors of inferior federal courts. Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vii. The fact that petitioner has been disappointed by the decision below does not make a case of sufficient stature to invoke the jurisdiction of this Court. As to any conflicts between district courts or between district courts and courts of appeal, it is for the appeals courts in the first instance to deal with such conflicts. There is no conflict among the appellate courts on this question and it would be premature to assume that there will be. If, as, and when such conflicts may develop between the appellate courts, it may become appropriate for this Court to consider the question; but to do so now would be premature and would simply be to indulge a disappointed loser who believes the circuit court made a mistake.[5]

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4. The decision in *Equal Employment Opportunity Commission v. Continental Oil Co.*, (D. Colo.) 13 FEP Cases 785, is in accord with the decision herein and was appealed to the Tenth Circuit. That circuit did not reach the Rule 23 question, however, and affirmed on other grounds. 548 F.2d 884 (10 Cir. 1977).

5. The Solicitor General asserts that the importance of the instant decision to EEOC enforcement actions, alone, warrants review, despite

Furthermore, close analysis of the circuit court's decision indicates that review by this Court is clearly not warranted because that decision is obviously correct. The opinion of the circuit court eloquently speaks for itself and needs no embellishment; however, solely for emphasis we will make a few brief points.

2. The reasons for application of Rule 23 to a class action are no less compelling when the EEOC is plaintiff than in any other class action. There is no basis in reason or in law why the EEOC should not have to comply with Rule 23 just as any other supplicant before the court who seeks class relief. The policy goals which Rule 23 was promulgated to achieve will be served as much by its application here as in any other class action. Nor will achievement of the national goal of eliminating employment discrimination be inhibited by application of Rule 23 here.

Rule 23 helps prevent piecemeal suits, saving time and expense. It permits the efficient resolution of the claims or liabilities of many individuals in a single action, and the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief. At the same time, it affords defendants some measure of protection against duplicative re-

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(Footnote 5 continued)

the absence of any conflict among the circuits. (Petit. p. 13). Assuming arguendo that the question is that important, we submit that fact would militate against granting the writ here, so that this issue can undergo thorough and complete ventilation under varying circumstances and in other circuits prior to consideration by this Court, should that ever become necessary.

coveries and it establishes a degree of control to check possible abuse of the class device. All of these interests remain compelling regardless of the identity of the plaintiff. As Judge Kunzig said in the opinion below: "If EEOC is exempted from Rule 23, chaos in management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question." (Petit. App. p. 19A)

The protection afforded a defendant is particularly appropriate in this case where, on the basis of charges from five individuals, four of them in one non-retail department (security) where some quite unique incidents allegedly happened, the EEOC has sought to balloon the action into one encompassing all 494 departments in all 9 of respondent's retail outlets in three states, using the broad federal discovery devices, pushing for class discovery without submitting to class action controls (and, in fact, resisting them). (Petit. App. pp. 19A, 20A) Months after the EEOC filed its initial complaint Holmes still did not know the precise nature of the "broad class of persons" on whose behalf EEOC was proceeding. EEOC would not say; it chose instead to file this appeal.

The reason it would not say is because it did not know. It was seeking a class "as broad as. . . syntax and ingenuity [would] allow."[6] Having gotten its foot in the courthouse door via the five charging parties and the original complaint, it was now, belatedly, conducting an investigation under the aegis of the liberal federal discovery rules. As Judge Kunzig

6. Concurring opinion of Judge Godbold in *Johnson v. Georgia Highway Express,* (5 Cir. 1969) 417 F.2d 1122.

said below, "Here EEOC is using the federal rules to conduct what may be a wide-ranging investigation into Holmes' affairs. But to the extent that it goes beyond the five identified complainants (and nobody seems to know just how far it goes), it looks like an investigation in search of a plaintiff. Certainly there is a right to investigate and a right to institute court action, but always under appropriate court rules which must protect all parties." (Petit. App. p. 22A)

As this Court said in *Hawaii v. Standard Oil*, 405 U.S. 251, 31 L.Ed.2d 184, 92 S.Ct. 885 (1972), "Rule 23 provides specific rules for delineating the appropriate plaintiff class [and] establishes who is bound by the action . . . ." If petitioner herein is not required to observe the requisites of Rule 23 we will not have any delineation of the plaintiff class. We will not know on whose behalf plaintiff is suing or who will be bound by the judgment. Will it be all women, or something less? If les, how much less? Will it be all former female employees of respondent? All present female employees? All female employees who failed to get promotions? All female applicants who failed to get a job? Will it be limited to certain job classifications? Will it be limited to certain stores or certain departments? Will it include retail sales departments?[7] Will it include female employees who have not been the object of "sexual advances"? The district court gave petitioner 90 days (plenty of time for additional discovery) to attempt to formulate answers to such questions in accordance with Rule 23, but it refused to even try. It filed this appeal instead, claiming that, as the sovereign, it does not have to answer such questions.

As Judge Godbold said in this concurring opinion in *Johnson v. Georgia Highway Express*, supra, "[T]he pleadings structure no class by defined acts, by time, by persons, by

7. The majority of respondent's employees work in retail sales departments. None of the charging parties did.

plant, by department, by supervisor or by any other means. The appellant has done no more than name the preserve on which he intends to hunt." That is all the EEOC has done here and all it intends to do.

A graphic example of the kind of abuse which would result if this Agency (or any other plaintiff) were not subject to the constraints of Rule 23 is found in the recent Fifth Circuit case, *Equal Employment Opportunity Commission v. Datapoint Corp.*, supra. There the district court certified the EEOC as class representative, the case was litigated all the way to final judgment and, the EEOC lost. On appeal to the Fifth Circuit the EEOC took the position that, although the members of the class would have enjoyed the benefits of backpay and a permanent injunction against Datapoint had the EEOC succeeded in its suit, nevertheless those individuals should not be bound by a decision unfavorable to the EEOC! The only reason the agency would possibly take that position is so the individuals on whose behalf it sued could themselves now sue should they choose to do so.[8] Yet in the instant case the petitioner unabashedly asserts that there would be little if any chance of repetitious suits or duplicative recovery. The effect of *Datapoint* and the decision below will be to prevent this kind of abuse. The decision should be allowed to stand.

3. The petitioner says it cannot comply with Rule 23 because, as the sovereign it represents the public, not the private interest. It says the public interest cannot fit within the framework of Rule 23. These phrases are repeated as a mantra, or incantation intended to convey lofty purpose. However, the words ring hollow. Petitioner never really

8. This is known in some circles as "heads we win, tails you lose."

says how the public and private interest are incompatible, except to suggest at one point that, when employee A sues for backpay it is a suit for money for A, but when petitioner sues for backpay for A it is to vindicate public policy. This is a distinction without a difference. When A brings a class action seeking backpay for himself and those he represents, does it not vindicate public policy? And when petitioner brings a class action seeking backpay, does it not vindicate private as well as public interest?

Indeed, private Title VII class action plaintiffs have been vindicating both public and private interests for years, pursuant to § 706(f) (1) of Title VII and Rule 23, the same sections and Rule involved herein. It has posed no problem for them. *Oatis v. Crown Zellerbach*, (5 Cir. 1968) 398 F. 2d 496. And for years we have been told by the courts that one reason for allowing such plaintiffs to maintain class actions under Rule 23 was because such (Title VII) actions were not private in nature, only, but were heavily freighted with the public interest. Indeed we are told that such plaintiffs act not only for themselves alone, but as "private attorneys general," vindicating a policy that Congress considered of the highest priority, *Oatis v. Crown Zellerbach*, supra; and that such actions have "extreme importance with heavy overtones of public interest"; that when an individual files such an action he takes on the "mantle of the sovereign." *Jenkins v. United Gas Corporation*, (5 Cir. 1968) 400 F.2d 28, 32.[9] Yet we are now confronted with the unlikely spectacle of the sovereign attempting to avoid having to conform to

9. See also *Bowe v. Colgate Palmolive Company*, (7 Cir. 1969) 416 F. 2d 711; *Huff v. N.D. Cass Company of Alabama*, (5 Cir. 1973) 485 F. 2d 710; *Burns v. Thiokol Chemical Corporation* (5 Cir. 1973) 483 F. 2d 300; *Sanchez v. Standard Brands, Inc.*, (5 Cir. 1970) 431 F.2d 455; *Wheeler v. American Home Products*, (5 Cir. 1977) 563 F.2d 1233).

Rule 23 as do lesser supplicants before the Court, on the ground that it cannot vindicate both the public and the private interest at one and the same time. We submit that if all those private attorneys general can enforce both private and public interests in one action, compatibly, then certainly the EEOC can do it too. The public interest and the private interest are clearly not incompatible in this context.

4. The petitioner makes the dubious assertion that class actions brought by the Commission pursuant to §706 are not subject to Rule 23 because neither Title VII nor its legislative history say they are subject to it. Of course the Commission has it backward. Rule 1 F.R.Civ.P. states that "these rules govern. . . all suits of a civil nature. . . at law or in equity . . . ." And while there are exceptions to this general rule, the exceptions are not implied by Congressional silence; where they occur they are express. For example, Congress has provided that claims for minimum wages under the Fair Labor Standards Act cannot be maintained as class actions under Rule 23. That is because § 16(b) of that act, 29 U.S.C. §216(b), limits the binding effect of a judgment adjudicating rights under the FLSA to persons who have filed written consent to become parties to the suit. And to insure that result, the Advisory Committee Note to the 1966 amendments to Rule 23 explicity stated, "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Advisory Committee Note 39 F.R.D. 69, 104. See also the reference in the opinion below to proceedings under the Bankruptcy Act, had under special rules of procedure promulgated by authority of 28 U.S.C. § 2075. (Petit. App. 17A fn. 12)

By contrast, there is nothing either in Title VII or the

Federal Rules of Civil Procedure which would indicate an intention of Congress or this Court to exempt the EEOC from Rule 23. The only exceptions stated in the rules are those found in Rule 81 F.R.Civ.P. The National Labor Relations Board is one such exception; the EEOC is not. As Judge Kunzig said below, "If Congress or the Supreme Court had wanted to include the EEOC among the exceptions, they clearly had the power to do so. 28 U.S.C. § 2072 (1970 & Supp. V 1975). They did not do so here." (Petit. App. 17A)

To the contrary, subdivision (b) (2) was added to Rule 23 in 1966 in part to make it clear that the class action device is available and appropriate in civil rights suits. The Advisory Committee Note says in part, "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class. . . . Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Note 39 F.R.D. 69, 102. That comment seems tailor-made to fit the kind of action petitioner is bringing herein. Although the Federal Rules were revised in 1966, before the EEOC had authority to sue, there is nothing in the Rule itself or in the Advisory Committee Note which would indicate that a class action civil rights suit brought by a federal agency ought to be exempt from the federal rules governing class actions.

5. Petitioner suggests that Rule 23 cannot apply to it because it is not a member of a class of aggrieved females. While it is true that there are cases which say that at least one of the named individual plaintiffs must be a member of the

class, this case is more closely analogous to cases in which associations such as trade unions, school boards, etc. have sued on behalf of their members. In many of these cases the "member of the class" issue has resolved itself into, whether or not the association is a real party in interest in the sense of Rule 17 F.R.Civ.P. Surely the EEOC *is* a real party in interest in the sense of Rule 17(a). It is made so by § 706(f) (1) of Title VII.

Further, some courts have recognized that if an organization has specific authority or has been created especially to protect the particular interests of its members, it can maintain an action on their behalf pursuant to Rule 23. For example, in *Norwalk CORE v. Norwalk Redevelopment Agency*, (2 Cir. 1968) 395 F.2d 920, 937, the court stated that: "[T]he reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interests of that class." It cannot be denied that the EEOC's reason for being is to represent the interests of persons who claim to have been discriminated against in violation of Title VII, as well as the public interest inherent therein.[10]

In some cases, particularly civil rights cases, the "member of the class" question equates actually to a question of standing. The Eighth Circuit has held that if the representative party has standing to sue and is a real party in interest under Rule 17(a), then it should not be dismissed from the action on the ground that technically it is not an individual member of the class. In *Smith v. Board of Education of Morrilton*

10. This factor alone distinguishes the instant situation from those cases cited in footnote 3 of the petition herein. (Petition p. 12)

School District No. 32, (8 Cir. 1966) 365 F.2d 77 (per Blackmum, J.), the Arkansas Teachers Association sought an injunction requiring the employment of high school teachers without regard to race. The district court dismissed the case on the merits and an appeal was taken. The Eighth Circuit determined that the Association had standing to bring the action and the fact that it was not a "member" of the class was not relevant and did not require a dismissal. "This approach seems sound inasmuch as the primary consideration should be whether the party can adequately represent the interests of the class. Once adequacy of representation and standing are established, the action should not be defeated because of the technical point that an organization, which is the real party in interest, is not a member of itself." Wright & Miller, Federal Practice and Procedure: Civil §1761.

That test is met here. The EEOC has been given standing by Congress in § 706 of Title VII. Further, it clearly meets the "adequacy of representation" test laid down by the Fifth Circuit in *Johnson v. Georgia Highway Express*, supra. Measured by the standards enunciated therein, the EEOC is not only an adequate class representative, but is indeed a class representative *par excellence*. It would be difficult to imagine any person or entity more qualified, experienced and generally able to conduct a proposed Title VII class litigation than the agency created to enforce that statute. Thus, adequacy of representation and standing are surely established here, and the EEOC cannot escape the application of Rule 23 because of the technical point that it is not a "member" of the class.

6. Finally we again echo the words of Judge Kunzig in the opinion below: "Only through properly functioning judicial procedures will the interests of either party be protected in

the long run. Absent a Congressionally developed alternative, there can be no good accomplished by an abandonment of Rule 23 in this case. In no way will the national goal of gaining equal employment opportunity be advanced by precipitously discarding our established rules of procedure." (Petit. App. 19A)

CONCLUSION

The decision of the United States Court of Appeal for the Fifth Circuit in affirming the trial court was correct and the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Opposition to Petition for Writ of Certiorari has been this day forwarded to all counsel of record by depositing a copy of same, postage prepaid, in the United States mail, as addressed below, on this 5th day of May, 1978.

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